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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOGEN ANTHONY SIMPSON,

Defendant and Appellant.

G055254

(Super. Ct. No. 16NF1713)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John D. Conley, Judge. Affirmed.

Kurt David Hermansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Allison V. Hawley and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Timogen Anthony Simpson contends the sentencing court erred in determining his 2009 Washington robbery conviction was a serious or violent felony under California law. He argues that under *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), the court could do no more than compare the legal elements of robbery under Washington law to the legal elements of robbery in Penal Code section 211.<sup>1</sup> Simpson asserts the court erred when it considered the additional facts Simpson expressly admitted in entering his Washington plea. Contrary to Simpson's assertion, *Gallardo* authorized the sentencing court to rely upon facts admitted by a defendant as the basis for a guilty plea. We find no error and affirm the judgment.

## I

### FACTS

In June 2016, D.M. travelled with Simpson and his girlfriend from Seattle, Washington to Portland, Oregon.<sup>2</sup> Simpson told D.M. he could get her work as a stripper in Portland. Instead, Simpson and his girlfriend took D.M. to California, even though D.M. told them she did not want to go there. Simpson forced D.M. to work as a prostitute and took the money she received from her customers. At times, Simpson threatened D.M. with a handgun he kept in his vehicle's glove compartment.

After several arguments, including one where Simpson choked D.M., Simpson left her at the bus station without any money. D. called 911. Later that day, officers arrested Simpson.

An information charged Simpson with human trafficking (§ 236.1, subd. (b), count 1); pimping (§ 266h, subd. (a), counts 2 and 10); pandering (§ 266i, subd. (a),

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise noted.

<sup>2</sup> Because the underlying facts are irrelevant to the issue on appeal, we recite an abbreviated version to provide context.

counts 3 and 11); criminal threats (§ 422, subd. (a), count 4); assault with force likely to cause great bodily injury (§ 245, subd. (a)(4), count 5); felon possessing a firearm (§ 29800, subd. (a)(1), count 6); felon possessing a concealed firearm in a vehicle (§ 25400, subds. (a)(1), (c)(1), count 7); false imprisonment (§ 236, count 8); and carrying a loaded firearm in public (§ 25850, subds. (a), (c)(1), count 9). It further alleged Simpson was armed with a firearm (§ 12022, subd. (a)(1)) when making the criminal threat charged in count 4. It also alleged Simpson previously sustained convictions for a serious and violent felony for a 2009 robbery in Washington State (§§ 667, subds. (d), (e)(1) & 1170.12, subds. (b) & (c)(1)) and a prison prior (§ 667.5, subd. (b)). He waived his right to a jury trial on whether he suffered the prior convictions underlying the strike prior and prison prior enhancements.

A jury convicted Simpson of all the charges and found the firearm enhancement true. In a bifurcated proceeding, the trial court found the strike prior and prison prior allegations to be true. The court considered Simpson's 2009 guilty plea in Washington State to second degree robbery under Washington Revised Code sections 9A.56.190 and 9A.56.210. A probable cause certification alleged Simpson approached three individuals on the street, told them they were being robbed, and, fearing for their safety, the individuals handed over five dollars in cash.<sup>3</sup> The 2009 plea agreement

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<sup>3</sup> The pertinent portion of the probable cause certification reads as follows: "On Wednesday, 03-19-08, at approximately 1530 hrs: victim RAY, Marshall, RAY, Maxwell and JOHNSON, James reported to Officer G. WILLIAMS #5565 from the SPD East Precinct that while standing in front of there [sic] residence, 902 22nd Avenue in the City of Seattle, when two male[] suspects approached them and stated, '*You know people get robbed out here.*' Suspect #1, stood near the three victims as suspect #2 stood several feet away, acting as a lookout. Suspect #1 placed his right hand under his shirt and down the front of his pants, implying that he was armed with a firearm. Suspect #1 informed the three victims that they were being "*Robbed and to empty your pockets.*" The victims, fearing for their safety, complied with the suspect #1's demands and proceeded to empty their pockets. Victim JOHNSON told suspect #1 that he did not have a wallet or any money. Suspect #2 saw that victim RAY, Marshall had a chain coming from his wallet and told him to give suspect #1 the wallet. RAY, Marshall told the suspects that the

showed Simpson pleaded guilty to second degree robbery “[a]s charged,” and stipulated the probable cause certification’s allegations were true.

Additionally, in a “Statement of Defendant on Plea of Guilty,” Simpson admitted he “unlawfully and with intent to commit theft . . . took personal property of another (cash) from the persons of Maxwell and Marshall Ray against their will, by the use or threatened use of immediate force, violence and fear of injury to such persons.”

The trial court sentenced Simpson to 17 years and four months in prison. His sentence consisted of the following: 8 years on count 1, doubled to 16 years based on the strike prior; a consecutive 16-month term on count 6; a concurrent 8-year term on count 10. The court stayed punishment on all other counts.

## II

### DISCUSSION

Simpson challenges the trial court’s true finding on his prior Washington State robbery conviction.<sup>4</sup> Simpson contends “the court made a disputed factual determination about the basis for his 2009 guilty plea” when it “looked beyond the prior offense’s statutory elements and found that – based on the conviction record – [his] conduct satisfied each element of California’s robbery statute.” He claims the court’s inquiry ran afoul of the Sixth Amendment, as it prohibits the trial court from making a

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wallet was a birthday present and that the suspect’s [sic] could have the contents, \$5.00 cash, but he wanted to keep the wallet because it was a birthday present. Suspect #1 took the cash and turned and walked away.”

<sup>4</sup> The Attorney General contends Simpson forfeited or waived the issue by failing to raise any federal constitutional objections in the trial court. *Gallardo* includes a discussion about forfeiture that casts doubt on the Attorney General’s argument. (*Gallardo, supra*, 4 Cal.5th at pp. 126-128.) In any event, we opt to address Simpson’s claim on the merits, if for no other reason than to forestall a habeas petition alleging ineffective assistance of counsel for failing to raise the issue. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Lewis* (1990) 50 Cal.3d 262, 282.)

factual finding about the conduct underlying the prior conviction. We do not find Simpson's contention persuasive.

First, the United States Supreme Court's *Descamps* decision does not preclude California courts from employing a modified categorical approach when examining indivisible statutes. Second, the court did not make a "disputed determination" on the underlying facts of his 2009 offense. It properly relied on the probable cause certification and the stipulated factual basis for Simpson's plea agreement.

"The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1082.) "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067.)

"To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53.) In determining whether a conviction from another jurisdiction qualifies as a strike, "a sentencing court may identify those facts . . . as to which the defendant waived the right of jury trial in entering a guilty plea. [Citation.] But it may not 'rely on its own finding' about the defendant's underlying conduct 'to increase a defendant's maximum sentence.'" (*Gallardo, supra*, 4 Cal.5th at p. 134.)

#### *A. The Trial Court Was Not Bound to an Elements-Based Analysis of the Robbery Statutes*

Simpson contends the trial court should have ended its inquiry after it determined the elements of the Washington robbery statute did not show he committed a serious felony under section 211. He argues under *Descamps*, "[t]he Sixth Amendment

contemplates that a jury – not a sentencing court–will find such facts [about the defendant’s underlying conduct], unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting the elements of the offense – as distinct from amplifying but legally extraneous circumstances.” (*Descamps, supra*, 570 U.S. at pp. 269-270.) We disagree.

There is no dispute that the Washington robbery statute<sup>5</sup> is broader than California’s robbery statute.<sup>6</sup> First, it requires intent to deprive another of property while California law requires intent to permanently deprive. (*People v. Anderson* (2011) 51 Cal.4th 989, 1002.) Second, under Washington law, a defendant need not have the intent to steal contemporaneously with the use of force or fear as required in California. (*People v. Marshall* (1997) 15 Cal.4th 1, 34-35.) Indeed, in Washington a defendant who forms the intent to steal after using force is guilty of robbery because “mere lack of an intent to rob at the moment” force is used “is not a defense.” (*State v. Craig* (1973) 82 Wash.2d 777, 783.)

In *Descamps*, the United States Supreme Court determined when a statute is indivisible, meaning it does not list multiple, alternative elements, the trial court may not look beyond the statutory elements and consider other matters in the court record to

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<sup>5</sup> In Washington, robbery is defined as: “A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.” (Wash. Rev. Code Ann. § 9A.56.190.)

<sup>6</sup> Under section 211, “[r]obbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

determine whether the specific offense the defendant committed would match the comparable generic offense under the Armed Career Criminal Act (ACCA), at issue in *Descamps*. (*Descamps, supra*, 570 U.S. at pp. 268-269.) Only when a divisible statute with multiple, alternative elements is at issue may the court look beyond the prior offense’s statutory elements and consider a limited range of approved record-based documents, such as jury instructions or the plea colloquy. (*Id.* at p. 264, fn. 2) The court described this process as the modified categorical approach. (*Id.* at pp. 269-270.)

The California Supreme Court in *Gallardo* analyzed *Descamps* and, rather than requiring the categorical approach described in *Descamps*, the *Gallardo* court sanctioned an examination of a defendant’s admissions that formed the factual basis for a guilty plea. It observed, “the high court did not hold that the Sixth Amendment, as opposed to the federal ACCA, forbids application of the so-called modified categorical approach when the statute of conviction has a single, ‘indivisible’ set of elements . . . indeed, as counsel confirmed at oral argument, defendant here does not argue that California courts are constitutionally compelled to emulate the high court’s version of the categorical approach in all of its particulars.” (*Gallardo, supra*, 4 Cal.5th at pp. 134-135.) The *Gallardo* court further explained, “[i]n determining the truth of an alleged prior conviction when . . . the necessary elements of that conviction do not establish that it is a serious felony, and thus subject to California’s Three Strikes law, the trier of fact must decide whether the defendant’s conduct, as demonstrated in the record of the prior conviction, shows that the crime was a serious felony.’ [Citation.] And when the sentencing court must rely on a finding regarding the defendant’s conduct, but the jury did not necessarily make that finding (or the defendant did not admit to that fact), the defendant’s Sixth Amendment rights are violated. [Citation].” (*Id.* at p. 135.)

*B. The Trial Court Did Not Make a Disputed Determination About the Factual Basis for Simpson's 2009 Guilty Plea*

Simpson next asserts the court ran afoul of the Sixth Amendment because it “made a disputed determination about the factual basis for [his] 2009 guilty plea.”

According to Simpson, any fact, other than the fact of a prior conviction, which increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt.<sup>7</sup> (*Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*); *Descamps, supra*, 570 U.S. 254; *Mathis v. U.S.* (2016) 136 S.Ct. 2243, 2271 (*Mathis*).)

During the pendency of this appeal, the California Supreme Court addressed the most recent iterations of *Apprendi*, *Descamps*, and *Mathis* in determining the trial court's role in making findings about a prior conviction. (*Gallardo, supra*, 4 Cal.5th at pp. 123-124.) In *Gallardo*, the Attorney General alleged the defendant suffered a prior strike based on an assault conviction under a pre-2012 version of section 245. (*Id.* at p. 123.) There, the defendant pleaded guilty to assault under former section 245, subdivision (a), which, at the time, could be violated by committing assault either with a ““deadly weapon”” or ““by any means of force likely to produce great bodily injury.”” (*Id.* at p. 136.) The defendant did not specify whether she used a deadly weapon when entering her guilty plea. (*Ibid.*) The trial court concluded the defendant used a deadly weapon to commit the assault based on the victim's preliminary hearing testimony that the defendant used a knife during their altercation. (*Ibid.*) Nothing in the record showed the defendant adopted the preliminary hearing testimony as the factual basis for her guilty plea. (*Ibid.*) Rather, the court in a bench trial found the allegation true based upon the preliminary hearing transcript. (*Ibid.*) The California Supreme Court concluded the trial court had engaged in constitutionally prohibited factfinding because it looked beyond defendant's record of conviction to find that the defendant used a deadly weapon to commit the assault. (*Id.* at pp. 134-137.)

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<sup>7</sup> Simpson waived his right to a jury trial on this issue.



Disapproving its earlier holding in *People v. McGee* (2006) 38 Cal.4th 682, the *Gallardo* court held: “The trial court’s role is limited to determining the facts that were necessarily found in the course of entering the conviction. To do more is to engage in ‘judicial factfinding that goes far beyond the recognition of a prior conviction.’” (*Gallardo*, *supra*, 4 Cal.5th at p. 134.) Thus, “a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the ‘nature or basis’ of the prior conviction based on its independent conclusions about what facts or conduct ‘realistically’ supported the conviction. [Citation.] That inquiry invades the jury’s province by permitting the court to make disputed findings about ‘what a trial showed, or a plea proceeding revealed, about the defendant’s underlying conduct.’ [Citation.] The court’s role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.” (*Id.* at p. 136, fn. omitted.)

Consistent with these Sixth Amendment principles, after identifying the statutory disconnect between the two statutes, the trial court here examined the record of conviction,<sup>8</sup> which included the Washington information, the felony plea agreement, the statement of Simpson’s signed guilty plea, and the probable cause certification. The information accused Simpson of “unlawfully and with intent to commit theft take personal property of another, to-wit: cash, wallet contents, from the persons and in the presence of Maxwell Ray and Marshall Ray, against their will, by the use or threatened use of immediate force, violence and fear of injury to such persons or their property.” Simpson’s statement on his guilty plea form provided “on or about March 19, 2008, I unlawfully and with intent to commit theft, [] took personal property of another (cash)

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<sup>8</sup> Simpson does not argue the court looked beyond the record of conviction.

from the persons of Maxwell and Marshall Ray against their will, by the use or threatened use of immediate force, violence and fear of injury to such persons.”

As memorialized in the probable cause certification, while the three victims were standing outside, Simpson and his confederate approached them and said, “[y]ou know people get robbed out here.” Simpson then announced that they were being robbed as he placed his hand under his shirt and down the front of his pants. “[F]earing for their safety,” the victims handed over the contents of their pockets to Simpson. In the felony plea agreement, Simpson stipulated that the facts in the certification for determination of probable cause were “real and material facts for purposes of this sentencing.”

Here, unlike *Gallardo*, the trial court did not make a “disputed determination” with regard to the underlying facts of Simpson’s 2009 offense. It did not engage in the kind of factfinding that the *Gallardo* court condemned. Instead, it properly relied on the certification for determination of probable cause, which Simpson adopted as the factual basis for his guilty plea. These facts were admissions about the nature of the crime, which did not require a jury or court to resolve disputed facts. *Gallardo* confirms that a trial court may consider a document which demonstrates what “the defendant admitted as the factual basis for a guilty plea.” (*Gallardo, supra*, 4 Cal.5th at p. 136, fn. omitted.) Simpson’s plea agreement, along with the certification for determination of probable cause, are such documents. As a result, the trial court was entitled to rely on them to “identify[] those facts that were established by virtue of the conviction itself.” (*Ibid.*)

Simpson’s conduct, as admitted in the probable cause certification, established that the conduct underlying his Washington offense met all the elements of California’s robbery statute. It demonstrated he had no intention of returning the victims’ property, that his intent to steal that property was formed contemporaneously with his exercise of force or fear, and that he was the perpetrator of the crime. Accordingly, the

trial court properly determined Simpson's Washington robbery conviction qualified as a strike under California law.

### III

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.